

FILED

OCT 27 2004

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIF.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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CALIFORNIA REPUBLICAN PARTY;
CALIFORNIA DEMOCRATIC PARTY;
and ORANGE COUNTY
REPUBLICAN PARTY;

NO. CIV-S-04-2144 FCD PAN

Plaintiffs,

v.

MEMORANDUM AND ORDER

FAIR POLITICAL PRACTICES
COMMISSION; LIANE RANDOLPH,
in her official capacity;
SHERIDAN DOWNEY II, in his
official capacity; THOMAS KNOX,
in his official capacity;
PHILLIP BLAIR, in his official
capacity; PAMELA KARLAN, in her
official capacity,

Defendants.

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On October 12, 2004, plaintiffs, California Republican Party
("CRP"), California Democratic Party ("CDP"), and Orange County

1 Republican Party ("OCR P") (collectively "plaintiffs") filed a
2 complaint with this court challenging the constitutionality of
3 two provisions of the California Political Reform Act ("PRA"),
4 Govt. Code § 81000, et seq. On October 20, 2004, plaintiffs
5 filed a motion for a preliminary injunction and an application to
6 shorten time. That same day, the court granted plaintiffs'
7 motion to shorten time, scheduled the matter for hearing on
8 October 26, 2004, and set an expedited briefing schedule.
9 (October 20, 2004 Order Granting Plaintiff's Application to
10 Shorten Time on Motion for Preliminary Injunction at 2.)

11 Having fully considered the arguments raised by counsel at
12 the October 26 hearing and in written memoranda filed with the
13 court, and for the reasons outlined herein, the court grants
14 plaintiffs' motion for preliminary injunction.

15 **FACTUAL AND PROCEDURAL HISTORY**

16 On November 5, 1996, California voters enacted the
17 "California Political Reform Act of 1996," or "Proposition 208"
18 ("Prop. 208"), an initiative statute that made sweeping changes
19 to California's Political Reform Act. Among its various
20 provisions, Prop. 208 required that any committee paying for an
21 advertisement supporting or opposing a ballot measure identify on
22 the face of the advertisement the committee's two largest
23 contributors of \$50,000 or more.¹ Cal. Govt. Code § 84503.

24 ¹ Cal. Govt. Code §84503 provides:

25 (a) Any advertisement for or against any ballot measure
26 shall include a disclosure statement identifying any
27 person whose cumulative contributions are fifty
thousand dollars (\$50,000) or more.

28 (b) If there are more than two donors of fifty thousand
dollars (\$50,000) or more, the committee is only
required to disclose the highest and second highest in

1 Prop. 208 mandated similar disclosure requirements when
2 committees make independent expenditures for candidates or ballot
3 measures.² Cal. Govt. Code § 84506.³

4 Shortly after Prop. 208's passage, it was subject to a legal
5 challenge in this court. California Pro Life Council Political
6 Action Committee v. Scully, 989 F. Supp. 1282 (1998). On January
7 6, 1998, this court entered a preliminary injunction barring
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11 that order. In the event that more than two donors meet
12 this disclosure threshold at identical contribution
13 levels, the highest and second highest shall be
14 selected according to chronological sequence.

15 ² Cal. Govt. Code § 84506 provides:

16 (a) A broadcast or mass mailing advertisement
17 supporting or opposing a candidate or ballot measure,
18 that is paid for by an independent expenditure, shall
19 include a disclosure statement that identifies both of
20 the following:

21 (1) The name of the committee making the independent
22 expenditure.

23 (2) The names of the persons from whom the committee
24 making the independent expenditure has received its two
25 highest cumulative contributions of fifty thousand
26 dollars (\$50,000) or more during the 12-month period
27 prior to the expenditure. If the committee can show, on
28 the basis that contributions are spent in the order
they are received, that contributions received from the
two highest contributors have been used for
expenditures unrelated to the candidate or ballot
measure featured in the communication, the committee
shall disclose the contributors making the next largest
cumulative contributions of fifty thousand dollars
(\$50,000) or more.

(b) If an acronym is used to identify any committee
names required by this section, the names of any
sponsoring organization of the committee shall be
printed on print advertisements or spoken in broadcast
advertisements.

Cal. Govt. Code § 84506.

³ All further statutory references are to the California
Government Code unless otherwise noted.

1 enforcement of Proposition 208.⁴ While that injunction was in
2 place and before resolution of the permanent injunction, the
3 voters enacted Proposition 34, which superceded most of Prop.
4 208's provisions, but left intact the above-described disclosure
5 provisions contained in Government Code sections 84503 and 84506.

6 The passage of Proposition 34 rendered moot most of the
7 plaintiffs' claims in Scully, except those raised by professional
8 slate mail vendors challenging the disclosure requirements in
9 section 84503. In an unpublished order, this court permanently
10 enjoined enforcement of section 84503 against slate mailer
11 organizations, though its provisions remain enforceable against
12 other forms of political committees.

13 Plaintiffs are subject to the disclosure requirements in
14 sections 84503 and 84506. As organized political party
15 committees, plaintiffs advance the shared political beliefs of
16 their members by engaging in political activities, including,
17 inter alia, recruiting and supporting candidates for elective
18 office, taking public positions on policy issues, engaging in
19 voter registration, conducting state conventions, and organizing
20 get-out-the-vote activities. (Declaration of Kathleen Bowler
21 ("Bowler Decl.") ¶ 4; Declaration of Micahel Vallante ("Vallante
22 Decl.") ¶ 5.)

23 Under the PRA, plaintiffs are "general purpose committees"
24 in that they are formed to support or oppose more than one
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27 ⁴ The court takes judicial notice of the March 1, 2001
28 order in California Prolife Council v. Scully, No. Civ. S-96-1965
LKK/DAD. Fed. R. Evid. 201.

1 candidate or ballot measure.⁵ This is distinguishable from a
2 "Primarily Formed Committee" which is defined as a committee
3 formed primarily to support or oppose a single candidate or
4 measure or group of candidates and/or ballot measures "voted upon
5 in the same city, county, or multicounty election." § 82047.5.
6 Both general purpose committees and primarily formed committees
7 must comply with the disclosure requirements in sections 84503
8 and 84506.

9 Pursuant to implementing regulations promulgated by
10 defendant Fair Political Practices Commission ("FPPC"), in order
11 to comply with the disclosure provisions in sections 84503 and
12 84506, a committee must "explicitly indicate that the contributor
13 or contributors were major donors to the committee by stating,
14 for example 'major funding by' or 'paid for by.'" Cal. Code Regs.
15 tit. 2 § 18450.4(a).

16 Both section 84503 and 84506 were amended recently by Senate
17 Bill 604 ("SB 604"), an urgency statute which became effective
18 upon signature of the Governor on September 10, 2004. Primarily,
19

20 ⁵ Section 82027.5 provides:

21 (a) "General purpose committee" means all committees
22 pursuant to subdivision (b) or (c) of Section 82013,
23 and any committee pursuant to subdivision (a) of
24 Section 82013 which is formed or exists primarily to
25 support or oppose more than one candidate or ballot
26 measure, except as provided in Section 82047.5.

27 (b) A "state general purpose committee" is a political
28 party committee, as defined in Section 85205, or a
committee to support or oppose candidates or measures
voted on in a state election, or in more than one
county.

(c) A "county general purpose committee" is a committee
to support or oppose candidates or measures voted on in
only one county, or in more than one jurisdiction
within one county.

1 the amendments changed the window of time used to determine which
2 contributors qualified as the "two largest contributors of
3 \$50,000 or more." Stats. 2004, c. 478 (S.B. 604) § 13. Prior to
4 SB 604's passage, the largest contributors were defined from the
5 date the committee filed its statement of organization and ending
6 seven days prior to the time the advertisement was sent to the
7 printer or broadcast station. As amended, the window begins "the
8 day the committee made its first expenditure to qualify, support
9 or oppose the measure and end[s] seven days before the
10 advertisement is sent to the printer or broadcast station." §
11 84502. Under the revised definitions, the two largest
12 contributors to the CDP in the preceding 12 months are the
13 California Teachers Association ("CTA") and Senator John Burton
14 ("Burton"). (Bowler Decl. ¶ 11.) For the CRP, the two largest
15 contributors are Chevron Texaco and Alex G. Spanos ("Spanos").
16 (Vallante Decl. ¶ 6.) Lastly, the largest contributors over the
17 preceding 12 months to OCRP are the New Majority Committee ("New
18 Majority") and the CRP. (Declaration of Scott Baugh ("Baugh
19 Decl. ¶ 6.)

20 The disclosure requirements mandate that plaintiffs list the
21 above-referenced contributors on all advertisements made in
22 conjunction with the November 2, 2004 election, including some
23 advertisements advocating positions which the contributors
24 actively oppose or on which they have no public position. (See
25 Bowler Decl. ¶ 15; Baugh Decl. ¶ 6; Vallante Decl. ¶ 6.)

26 According to plaintiffs, these mandated disclosures violate
27 their First and Fourteenth Amendment rights in that they impair
28 the effectiveness of their political advertisements by coopting

1 valuable print space and, in some cases, linking the political
2 message to contributors against which potential readers might
3 harbor bias.⁶ (See e.g., Vallante Decl. ¶ 10.)

4 STANDARD

5 The Ninth Circuit recognizes two tests for determining
6 whether to grant a preliminary injunction.

7 Under the traditional test, the movant must establish four
8 factors to obtain injunctive relief: 1) a likelihood of success
9 on the merits; (2) a significant threat of irreparable injury;
10 (3) that the balance of hardships favors the applicant; and (4)
11 whether any public interest favors granting an injunction. Raich
12 v. Ashcroft, 352 F.3d 1222, 1227 (9th Cir. 2003).

13 Alternatively, the Ninth Circuit has articulated the test as
14 requiring the moving party to demonstrate either (1) a
15 combination of probable success on the merits and the possibility
16 of irreparable injury or (2) that serious questions are raised
17 and the balance of hardships tips in its favor. These two
18 formulations are not inconsistent. Rather, they represent two
19 points on a sliding scale in which the required degree of
20 irreparable harm increases as the possibility of success
21 decreases. Roe v. Anderson, 134 F.3d 1400, 1402 & n. 1 (9th Cir.
22 1998), aff'd, Saenz v. Roe, 526 U.S. 489 (1999).

23 ANALYSIS

24 1. Irreparable Injury

25 To obtain a preliminary injunction plaintiff must first
26 demonstrate that there exists a significant threat of irreparable

27 ⁶ The First Amendment is made applicable to the states by
28 the Fourteenth Amendment.

1 injury." Oakland Tribune, Inc., 762 F.2d at 1376. In the
2 absence of a significant showing of irreparable injury, the court
3 need not reach the issue of likelihood of success on the merits.
4 See id.

5 Loss of First Amendment freedoms generally is regarded as an
6 irreparable injury, even if short in duration. Elrod v. Burns,
7 427 U.S. 347, 272 (1976). Here, the disclosure requirements may
8 deprive plaintiffs of their ability to keep the identity of their
9 contributors separate from their political message.⁷ Connecting
10 the political message to specific groups may prejudice voters
11 against the position advocated. As an example, plaintiffs note
12 that the disclosure requirement that Chevron Texaco be listed as
13 a major donor on all CRP advertisements may reduce the
14 advertisements' effectiveness with voters who view dislike that
15 corporation. Similarly, voters who dislike labor unions may be
16 biased against CDP advertisements which identify CTA as a major
17 contributor. The Supreme Court has recognized the "respected
18 tradition of anonymity in the advocacy of political causes," in
19 part based on the understanding that ideas may at times "be more
20 persuasive if . . . readers are unaware of [the speaker's]

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22
23 ⁷ Plaintiffs also provide testimony from party officials
24 that contributors may curtail the amount of contributions in the
25 future to avoid qualifying for on-publication disclosure of the
26 contributors' identity. Defendants argue that this injury is
27 speculative because plaintiffs have not submitted testimony from
28 any donor that has refrained from contributing in order to avoid
on-publication disclosure of the donor's identity. However, for
purposes of this motion, it is not necessary that the court
decide whether this injury is sufficiently concrete or imminent
since plaintiffs have established the presence of independent
injury.

identity."⁸ McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 343 (1996); see also American Civil Liberties Union of Nevada v. Heller, 378 F.3d 979, 988 (9th Cir. 2004.) Thus, plaintiffs have identified an irreparable injury likely to occur unless the injunction is granted.

2. Likelihood of Success on the Merits

Plaintiffs also must demonstrate either likely success on the merits or that serious questions are raised and the balance of hardships tips in its favor.

All parties agree that the challenged statutes must satisfy strict scrutiny. Heller, 378 F.3d at 992-993 ("As a content-based limitation on core political speech, the Nevada Statute must receive the most 'exacting scrutiny' under the First Amendment.") (quoting McIntyre, 514 U.S. at 346. Such requirements survive strict scrutiny only if they are "narrowly tailored to serve an overriding state interest." Id. (quoting McIntyre, 514 U.S. at 357). More specifically, "a content-based regulation of constitutionally protected speech must use the least restrictive means to further the articulated interest." Id. (quoting Foti v. City of Menlo Park, 146 F.3d 629, 636 (9th Cir.1998)).

Defendants' asserted purpose for requiring on publication disclosure of the two major contributors is to provide relevant

⁸ Defendants argue that the contributors are not in fact anonymous, since they must disclose their identities under contribution reporting requirements in existing law. However, "it is not just that a speaker's identity is revealed, but how and when that identity is revealed, that matters in a First Amendment analysis of a state's regulation of political speech." Heller, 378 F.3d at 991.

1 information to voters. Specifically, defendants note that
2 voters' "capability of evaluating who is doing the talking is of
3 great importance, and expecting voters to accomplish such
4 evaluation solely by reference to the after-the-fact disclosure
5 reports on file with the Secretary of State is unrealistic."
6 (Opp'n at 12.) The Supreme Court has recognized that informing
7 voters regarding campaign contributors is a compelling purpose
8 and plaintiffs do not contend otherwise.

9 However, the governmental objective of informing voters will
10 not justify *all* disclosure requirements; what is sufficiently
11 compelling to justify one disclosure requirement may not suffice
12 to justify another. In Heller, supra, the Ninth Circuit
13 confronted a Nevada statute requiring on-publication disclosure
14 of parties responsible for any materials relating to an election
15 of a candidate or ballot measure. In support of the disclosure
16 requirements, the defendant in Heller proffered several
17 governmental interests, including the need to provide
18 information to voters regarding the identity of campaign donors.
19 The Ninth Circuit specifically rejected as "not sufficiently
20 compelling," the government's stated interest of informing
21 voters, finding that "the simple interest in providing voters
22 with additional relevant information does not justify a state
23 requirement that a writer make statements or disclosures she
24 would otherwise omit." Heller, 378 F.3d at 993 (quoting
25 Mcintyre, 514 U.S. at 348-349).

26 Admittedly, the statute in Heller was broader than that
27 challenged here. However, the factual distinctions between the
28 statutes do not undermine the applicability of Heller's

1 reasoning. Relying heavily on the Supreme Court decision in
2 McIntyre, the Heller court noted that "both [cases] involve
3 campaign statutes that go beyond requiring the reporting of funds
4 used to *finance* speech to affect the *content of the communication*
5 *itself*. This case and McIntyre therefore involve governmental
6 proscription of the speech itself unless it conforms to
7 prescribed criteria." Id. at 987 (emphasis in original). Like
8 both Heller and McIntyre, the major donor disclosure requirements
9 at issue here go beyond the reporting of funds that finance
10 speech to affect the content of the advertisements.⁹ Because
11 these types of on-publication disclosure requirements are
12 "considerably more intrusive than simply requiring [speakers] to
13 report to a government agency," they are a "content-based
14 restriction on core political speech" which must receive "the
15 most 'exacting scrutiny' under the First Amendment. Heller, 378
16 F.3d at 992 (quoting McIntyre, 514 U.S. at 346).

17 Defendants cannot satisfy that test here because existing
18 off-publication requirements are less restrictive on speech and
19 more effective in meeting the purpose of informing voters.
20 Contrary to defendants' suggestion during oral argument that
21 contributor information is available only in "dusty" old files at
22 the Secretary of State's office, in fact voters can easily obtain
23 access to the identities of a political party's contributors
24 through recourse to reported contributor information filed with
25 the Secretary of State. In the last 16 days before an election,
26 committees must disclose contributions within 24 hours. This

27 ⁹ Conceivably, some form of on-publication disclosure
28 requirements could survive after Heller and McIntyre.

1 information is available over the internet in a user-friendly
2 database. Indeed, defendants' counsel made use of this very
3 system to calculate for the court the amount of money expended
4 thus far on political advertising in California for the November
5 2004 election. (See Opp'n at 12 n. 7.) Consequently, voters can
6 obtain daily updated information regarding a speaker's
7 contributors by accessing the Secretary of State's on line
8 records.

9 Further, the Secretary of State's contributor report
10 information provides a far more complete and accurate picture to
11 voters than the limited major donor disclosures mandated by
12 sections 84503 and 84506. The latter disclosures require
13 political party committees to single out on the face of the
14 document two out of tens of thousands of contributors, many of
15 whom also make sizeable contributions. This "visual byte"
16 provides a limited and potentially distorted picture of a
17 political party's contributors.

18 In the context of primarily formed committees, this bit of
19 information might prove useful at identifying the true "speaker."
20 As the Heller court noted, "individuals and entities interested
21 in funding election-related speech often join together in ad hoc
22 organizations with creative but misleading names." Heller, 378
23 F.3d at 994. In such cases, the government may indeed have a
24 compelling interest in unveiling for the voters the true
25 "speakers" behind such an advertisement. However, this is not
26 such a case. In the context of political parties, the true
27 "speaker" is the political party, whose name is disclosed on the
28 face of the advertisement.

1 In fact, identifying a political party's two largest
2 contributors as the "speakers" could mislead voters because these
3 contributors may not endorse the message in the advertisement.
4 Contributions are made to political parties for many reasons,
5 including agreement with a party's general philosophy, support of
6 certain platform positions, or simply opposition to the competing
7 party. The political parties in turn use this funding to support
8 a wide variety of activities, including dissemination of
9 advertisements in support of, or opposition to, myriad candidates
10 and ballot measures. It is not difficult to imagine a situation
11 in which the contributor will be identified as a major donor on
12 an advertisement containing a political message with which the
13 contributor does not agree.¹⁰ To the contrary, it seems nearly
14 inevitable in light of the plethora of positions advocated by the
15 political parties in a given year. However, the court need not
16 speculate as plaintiffs have identified concrete examples from
17 this election cycle. Plaintiffs note that one of the CDP's major
18 donors, CTA, is officially neutral on the 15th District State
19 Senate election, as well as Propositions 63 and 72. Yet CTA will
20 be identified as a major funding source on mail endorsing
21 Democrat Peg Boland in the 15th Senate race and taking positions
22 on most statewide ballot measures (Id.) (citing Nunez Decl. ¶ 8-9,

23
24 ¹⁰ One of the principal arguments raised by defendants'
25 counsel during argument was the need for full discovery before a
26 hearing on the merits, at which plaintiff would be able to
27 provide the court with the actual number of times a major
28 contributor identified on an advertisement disagreed with the
advertisement's message. While there may be circumstantial
evidence on this issue, absent an extraordinary degree of candor,
the court wonders how the state could constitutionally elicit
disclosure of one's political beliefs or preferences.

1 Bowler Decl. ¶ 15.) In addition, plaintiffs note that the New
2 Majority Committee, one of the two largest contributors to the
3 OCRP, supports Proposition 62 and has contributed \$25,000 to
4 Californians for an Open Primary Committee, a Primarily Formed
5 Committee advocating passage of Proposition 62. However, the
6 OCRP opposes Proposition 62 and the New Majority Committee will
7 be identified as providing major funding for the OCRP's walk
8 piece which advocates defeat of Proposition 62. (Baugh Decl. ¶
9 6.) In these situations, voters may infer inaccurately that
10 contributors, such as CTA and the New Majority Committee endorse
11 the political messages espoused in the advertisement.¹¹ By
12 potentially misleading voters, the disclosure of major donors to
13 political parties may actually undermine the stated governmental
14 interest of providing information to voters regarding the
15 "identity of the speaker."

16 Consequently, the court finds that plaintiffs have
17 demonstrated serious questions going to the merits of their claim
18 that the disclosure requirements in sections 84503 and 84506
19 unconstitutionally infringe their First Amendment right to free
20 speech and association.

21 **3. Balance of Hardships**

22 The court is concerned that plaintiffs waited until less
23 than two weeks before the general election to seek injunctive
24 relief. As of the issuance of this order, there are just five

25 ¹¹ By contrast, in the context of a Primarily Formed
26 Committee, such inference may be reasonable. For example, one
27 might reasonably infer that the New Majority Committee supports
28 Proposition 62 in light of its contribution to the Californians
for an Open Primary Committee, which is organized for the primary
purpose of advocating Proposition 62's passage.

1 mail days before the election. Presumably, at this point, the
2 campaigns have been in full swing for months and most of the
3 advertisements have been printed and sent. Consequently, much of
4 the asserted injury already has occurred. However, the fact
5 remains that plaintiffs have demonstrated an ongoing harm over
6 the next few days which has First Amendment implications.
7 Further, the Heller decision's rejection of on-publication
8 disclosure requirements substantially bolsters plaintiffs'
9 position.

10 In light of these considerations, and because the state has
11 offered no authority for denying relief on the basis of laches,
12 in a First Amendment case where the plaintiffs delay appears to
13 be less than two months, the court feels constrained to grant
14 plaintiffs' request for a preliminary injunction.

15 The court stresses that this is a provisional remedy.
16 During oral argument, defendants' counsel expressed some degree
17 of frustration regarding the limited time provided to prepare for
18 hearing in this case. This is understandable, particularly in
19 light of the fact that plaintiffs created the exigency through
20 their delay in filing the complaint. However, defendants will
21 have every opportunity to fully develop the factual record and
22 legal issues in this case and make their case on the merits. The
23 court holds only that, in light of the constitutional dimensions
24 of the injury, plaintiffs have met their burden to obtain
25 injunctive relief. The court intends to hear the case on the
26 merits on an expedited schedule, well prior to any future
27 election cycle.

28 ///

CONCLUSION

For the foregoing reasons, it is hereby ordered that defendants and all of their respective officers, agents, servants, employees, representatives, and attorney and those persons in active concert or participating with any of the above with actual notice of this Preliminary Injunction, are hereby restrained and enjoined from enforcing Cal. Govt. Code §§ 84503 and 84506 against plaintiffs or similarly situated political party committees registered with the Secretary of State as general purpose committees pending entry of a final judgment in this case.

Pursuant to Fed. R. Civ. P. 65(c) and Local Rule 65-231(d)(1), the aforementioned Preliminary Injunction shall be effective upon plaintiffs' filing of a bond in the amount of \$1,000.00.

IT IS SO ORDERED.

Dated: October 27, 2004


FRANK C. DAMRELL, Jr.
UNITED STATES DISTRICT JUDGE

United States District Court
for the
Eastern District of California
October 27, 2004

* * CERTIFICATE OF SERVICE * *

2:04-cv-02144

CA Republican Party

v.

Fair Political Prac

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on October 27, 2004, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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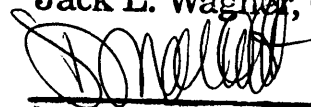
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by: Deputy Clerk